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7 **UNITED STATES DISTRICT COURT**
8 **SOUTHERN DISTRICT OF CALIFORNIA**

9 UNITED STATES OF AMERICA, CASE NO. 15cr716-WQH
10 Plaintiff, ORDER
11 vs.
12 KENNETH DUANE SUMMERS,
13 Defendant.

13 HAYES, Judge:

14 The matters before the Court are: (1) the motion to suppress evidence obtained
15 at an unconstitutional checkpoint; and (2) the motion to suppress evidence obtained by
16 an unconstitutional trunk search (ECF Nos. 53-1, 53-2 and 67-1, 67-2).

17 **I. Background Facts¹**

18 The United States Border Patrol, El Centro Sector operates the Highway 86
19 checkpoint near Westmorland, California. The Highway 86 checkpoint is a permanent
20 checkpoint staffed solely by Border Patrol agents. During the past three-year period,
21 there were approximately 1,746 apprehensions at the checkpoint, approximately 1,579
22 were immigration related and approximately 167 were drug-related.

23 On February 28, 2015, at approximately 8:30 p.m., Defendant Kenneth Summers
24 approached the Highway 86 checkpoint in a black Volkswagen Jetta. Defendant sat
25 behind the wheel, and his son sat in the passenger seat. Defendant pulled up to the
26 primary inspection point and stopped at the marked stop sign. United States Border
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28 ¹ On December 8, 2015, the Court held an evidentiary hearing at which testimony
was taken and exhibits received. (ECF No. 111).

1 Patrol Agent Stephen Stypinski identified himself as a Border Patrol agent and asked
2 Defendant for his citizenship status. Defendant responded that he was a United States
3 citizen.

4 While Agent Stypinski questioned the Defendant, United States Border Patrol
5 Agent Aaron Miranda and his canine partner, Boeli, walked behind the vehicle. A
6 video of the primary area shows that Boeli sniffed the trunk of the Jetta from the drivers
7 side to the passenger side and paused for a few seconds in front of Agent Miranda.
8 Agent Miranda and Boeli then proceeded toward the front passenger side of the vehicle.
9 Agent Miranda testified that he asked Agent Stypinski to have the Defendant open the
10 trunk as he approached the passenger side door. Agent Stypinski testified that he
11 complied with Agent Miranda's request. Agent Stypinski testified, "I don't remember
12 the exact words. It was probably something like, can you open the trunk, can I search
13 the trunk, along those lines." (ECF No. 111 at 15). Defendant testified, "I am not
14 exactly sure. [Agent Stypinski] said, pop the trunk. He said, roll down the back
15 window, roll down the back window, and then he said, pop the trunk or open the trunk."
16 *Id.* at 130. Defendant testified that he interpreted Agent Stypinski's statement as an
17 order and that he did not feel that he had a choice.

18 Defendant attempted to open the trunk from the inside of his car, but he was
19 unable to do so. While Defendant was attempting to find the lever insider the vehicle
20 to open the trunk, Agent Miranda and Boeli walked back to the rear of the vehicle. The
21 video shows that Agent Miranda attempted to open the trunk as he arrived back at the
22 rear of the vehicle but that the trunk had not released. The video shows that Boeli
23 stopped behind the driver side of the trunk and continued to sniff at the trunk area for
24 approximately twenty seconds.

25 Agent Stypinski requested that the Defendant move to the secondary area. The
26 encounter at primary, recorded on the video, took approximately 40 seconds.
27 Defendant proceeded past the designated parking spots in the secondary area marked
28 with white lines and pulled over to the side of the road past the parking spots. Agent

1 Eric Hanna walked over the driver's side of the vehicle and asked the Defendant to
2 open his trunk. Agent Hanna testified, "It is in a form of a request, along the lines of,
3 are you able to open the trunk from there?" *Id.* at 31. Defendant used his key fob to
4 release the trunk hatch. Agent Hanna opened the trunk and found two persons
5 concealed in the trunk. Agent Hanna ordered Defendant out of his car, handcuffed him,
6 and frisked him. Defendant was placed under arrest.

7 Defendant is charged in an indictment with transportation of illegal aliens for
8 financial gain and aiding and abetting in violation of 8 U.S.C. §§ 1324(a)(1)(A)(ii),
9 (v)(II), and (a)(1)(B)(I). (ECF No. 19).

10 At the evidentiary hearing, Agent Miranda testified that he was trained as the
11 canine handler for Boeli and that he has been Boeli's handler for five years, including
12 5,000 hours of field experience. Agent Miranda testified that he and Boeli initially
13 received an eight-week training course, and that he and Boeli train together on a
14 biweekly basis. Agent Miranda testified that he and Boeli have received a United States
15 Border Patrol Detection Team Certification for the years 2011, 2012, 2013 and 2014.
16 Plaintiff submitted Boeli's training records, including Performance Standard Score
17 Sheets.

18 Agent Miranda testified that Boeli is trained to find things by their odor,
19 including concealed humans, marijuana, heroin, methamphetamine, and all derivatives
20 of those drugs. Agent Miranda testified that when Boeli comes across an odor that he
21 is trained to find "he changes posture, his demeanor. His breathing changes. He tenses
22 up, starts breathing out his nose, closes his mouth. His whole body changes up." *Id.*
23 at 41. Agent Miranda testified that he describes this change in Boeli's behavior as "an
24 alert." *Id.* In addition to an alert, Agent Miranda testified that Boeli is trained to try to
25 "find exactly where the odor is coming from" which Agent Miranda describes as "an
26 indication." *Id.* Agent Miranda testified that he has tried to train Boeli to sit in order
27 to indicate that he smelled an odor he was trained to detect but that Boeli has been
28 unable sit in order to indicate. Agent Miranda testified that alert behavior is different

1 from indication behavior. Agent Miranda testified that Boeli will try to sit for
2 indication behavior but that “he is a different kind of breed of dog, so he’ll start back
3 peddling and is barking because he is ready for me to give him his toy.” *Id.* at 42.
4 Agent Miranda testified that indication behavior is not required to find an alert.

5 Agent Miranda testified that Boeli is trained to detect concealed people in
6 different scenarios including inside a moving vehicle. Agent Miranda testified that
7 Boeli can “distinguish cars with people in them from cars with concealed people in
8 them.” *Id.* at 44. Agent Miranda testified that “I am not an instructor, so I don’t really
9 know how they do the training or how he does it. It amazes me too, but it works.” *Id.*
10 Agent Miranda testified that on a typical day thousands of cars come through the
11 checkpoint and that Boeli could alert “anywhere from two to six or seven” times. *Id.*
12 at 46. Agent Miranda testified that Boeli has found “five to seven human beings and
13 twelve narcotics busts” over their five-year career. *Id.* at 105.

14 Agent Miranda testified that he is trained to recognize Boeli’s alert. Agent
15 Miranda testified that Boeli initially “seemed very interested” in the Defendant’s
16 vehicle. *Id.* at 69. Agent Miranda testified that Boeli alerted to the Jetta at the initial
17 encounter behind the trunk on the passenger side of the vehicle. Agent Miranda
18 testified “his mouth closed, his body tensed, and just his whole demeanor changed.”
19 *Id.* at 70. Agent Miranda testified, “I continued to search to see if I could get him to
20 pinpoint it.” *Id.* at 71. Agent Miranda testified that he and Boeli proceeded to the
21 passenger door of the vehicle, that he asked Agent Stypinski to “ask the [Defendant] if
22 we could look in the trunk,” and that he and Boeli returned to the trunk area of the
23 vehicle. *Id.* Agent Miranda testified that Boeli did not sit at the trunk area of
24 Defendant’s vehicle and did not back up and bark at the trunk area of Defendant’s
25 vehicle. Agent Miranda testified that he based his conclusion that he had probable
26 cause on the “preliminary alert behavior.” *Id.* at 91. Agent Miranda testified that he
27 had probable cause to look in the trunk at the initial alert from Boeli and that he did not
28 have to wait for any indication behavior from Boeli.

1 At the evidentiary hearing, Defendant presented the testimony of an expert
2 witness who operates a business training dogs for law enforcement and security
3 organizations. The expert testified that he was familiar with the distinction between
4 alert behavior and indicating behavior. The expert testified, “that the initial alert . . . is
5 just an indication that the dog is interested in something . . . it could be the trained odors
6 that we have trained the dog to do in training, but it can also be any other – a number
7 of other things, from food, to urine on a tire, to road kill in the undercarriage. Dogs
8 show that same behavior when they are interested in other things . . . closed mouth,
9 body language changes . . .” *Id.* at 147.

10 Defendant’s expert was asked, “In your opinion is it possible to train a dog to
11 alert to concealed human smell but ignore or differentiate other human smell in the
12 same vehicle?” The expert answered, “Not inside the same vehicle. If there is
13 somebody inside the vehicle and somebody in the trunk, or you take the person out of
14 the trunk, it doesn’t matter. It is all – it is the same to the dog.” *Id.* at 151-52.
15 Defendant’s expert viewed the video of Boeli encountering the Defendant’s vehicle in
16 the primary area and was asked, “Do you have an opinion whether that dog was giving
17 – giving an indication to the trunk of that car?” The expert answered, “No. I saw a dog
18 appear as if he was sniffing the vehicle . . . Dogs are supposed to sniff the vehicles to
19 find the odor. An alert would be for the dog to sit and put his nose where the source of
20 the odor is coming out.” *Id.* at 155-56.

21 Defendant’s expert testified that the training records and certifications in this case
22 cannot be relied upon. Defendant’s expert testified that the records did not include
23 necessary deployment records, and that the records did not adequately indicate the
24 source and quantity of narcotics used. Defendant’s expert testified that it is important
25 to have the certification done by someone other than the agency employing the dog
26 because “there is a vested interest in the failures or successes.” *Id.* at 160.

27 **II. Unconstitutional Checkpoint**

28 Defendant contends that the operation of the Highway 86 Border Patrol

1 checkpoint is unconstitutional in violation of the Fourth Amendment to the United
2 States Constitution. Defendant contends that the checkpoint has outgrown the original
3 purpose of immigration enforcement and expanded into other areas of law enforcement
4 unrelated to immigration, including drug enforcement. The Government contends that
5 the primary purpose of the Highway 86 Border Patrol Checkpoint remains immigration-
6 related. The Government contends that immigration checkpoints do not violate the
7 Fourth Amendment, even where stops result in drug interdiction.

8 In *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), defendants challenged
9 two permanent Border Patrol checkpoints on Fourth Amendment grounds, including a
10 checkpoint located near San Clemente, California, on Interstate 5, sixty-six miles from
11 the U.S.-Mexico Border. The San Clemente checkpoint brought all northbound
12 vehicles to “a virtual, if not a complete, halt.” *Id.* at 546. Although most motorists
13 were allowed to resume their progress “without any oral inquiry or close visual
14 examination,” an agent would direct a small number of vehicles to a secondary
15 inspection area for further inquiry. *Id.* The United States Supreme Court recognized
16 a need for a “traffic-checking program in the interior . . . because the flow of illegal
17 aliens cannot be controlled effectively at the border.” *Id.* at 556. The Supreme Court
18 held that “the stops and questioning at issue may be made in the absence of any
19 individualized suspicion at reasonably located checkpoints.” *Id.* at 562. The Supreme
20 Court further held that “it is constitutional to refer motorists selectively to the secondary
21 inspection area at the San Clemente checkpoint on the basis of criteria that would not
22 sustain a roving-patrol stop.” *Id.* at 563. “As the intrusion here is sufficiently minimal
23 that no particularized reason need exist to justify it, we think it follows that the Border
24 Patrol officers must have wide discretion in selecting the motorists to be diverted for
25 the brief questioning involved.” *Id.* at 563-64.

26 In *United States v. Soto-Camacho*, 58 F.3d 408 (9th Cir. 1995), the Court of
27 Appeals for the Ninth Circuit rejected a Fourth Amendment challenge to a Border Patrol
28 checkpoint located near Jacumba, California. The Court of Appeals explained, “its

1 primary purpose is to check for aliens, all vehicles are stopped, the checkpoint is well
2 identified, Border Patrol agents exercise no discretion over the checkpoint's operation,
3 and the stop itself involves a minimal intrusion." *Id.* at 411. The Court of Appeals
4 concluded, "We . . . hold that the Jacumba checkpoint stop itself was not infected, . . .
5 by the fact that the Border Patrol bases the timing of its decision to set up the
6 checkpoint in part on drug intelligence." *Id.* at 412.

7 In *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), the United States
8 Supreme Court decided the constitutionality of a traffic checkpoint, where the
9 program's primary purpose was interdiction of illegal narcotics. The Supreme Court
10 "decline[d] to approve a program whose primary purpose is ultimately indistinguishable
11 from the general interest in crime control." *Id.* at 44. The Supreme Court concluded
12 that the general rule of individualized suspicion should apply to traffic stops in the
13 general crime control context.

14 In this case, the Highway 86 checkpoint is a permanent checkpoint operated
15 solely by Border Patrol agents. During the past three year period, there were
16 approximately 1,746 apprehensions at the checkpoint, including 1,579 immigration-
17 related apprehensions and 167 drug-related apprehensions.² The record shows that the
18 primary purpose of the checkpoint is to check for aliens, and all vehicles are stopped.
19 The record shows that the checkpoint is well-identified, and the stop involved minimal
20 intrusion. There is no evidence that the checkpoint was operated for any purpose other
21 than immigration enforcement. There is no evidence that Defendant in this case was
22 stopped for any purpose other than immigration enforcement. *See Soto-Camacho*, 58
23 F.3d at 411 ("There was no evidence here to suggest that the Jacumba Checkpoint was
24 operated solely for the purpose of drug interdiction, or that Soto himself was stopped,
25 referred to secondary, or asked for permission to search his vehicle solely to look for
26 drugs."). Defendant's Fourth Amendment rights were not violated as a result of his stop
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28 ² Declaration of Richard Ransdell, Acting Assistant Chief Patrol Agent, United
States Border Patrol, El Centro Sector, (ECF No. 60).

1 at the Highway 86 checkpoint.

2 Defendant's motion to suppress evidence obtained from an unconstitutional
3 checkpoint is denied.

4 **III. Unconstitutional Trunk Search**

5 **a. Consent**

6 Defendant asserts that the search of his trunk was carried out without a warrant,
7 without his consent, and without probable cause. Defendant contends that he did not
8 consent to the search of his trunk, that Agents Stypinski and Agent Hanna ordered him
9 to open the trunk, and that the agents did not inform him that he could refuse the order.
10 The Government contends that Defendant voluntarily consented to the search because
11 agents asked Defendant for consent, in both the primary inspection area and the
12 secondary inspection area. The Government asserts that Defendant had not been seized
13 at the time he was asked to consent.

14 The Government bears "the heavy burden of demonstrating that the consent [to
15 search] was freely and voluntarily given." *United States v. Chan-Jimenez*, 125 F.3d
16 1324, 1327 (1997) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973)). "Among
17 the factors that tend to show a lack of voluntariness are: (1) the person was in custody;
18 (2) the officer had his weapon drawn; (3) the officer failed to administer *Miranda*
19 warnings; (4) the officer did not inform the person of his right to refuse to consent; and
20 (5) the person was told that a search warrant could be obtained." *Id.*

21 The record in this case does not establish that Defendant affirmatively consented
22 to the search of his trunk. The testimony of the agents indicates that the Defendant was
23 directed to open his trunk. While the agents did not draw their weapons, the agents did
24 not inform the Defendant that he had the option to refuse to consent or inform the
25 Defendant that a search warrant could be obtained. The record is not sufficient to meet
26 the Government's heavy burden to show that the Defendant was asked for consent to
27 search his trunk and that Defendant freely and voluntarily consented to the search of his
28 trunk.

B. Probable cause to search the trunk

Defendant contends that Boeli, the canine, did not give a positive alert sufficient to support probable cause. Defendant challenges the evidence of Boeli's qualifications and performance, the adequacy of Boeli's training program, and the circumstances surrounding Boeli's alert behavior. Defendant contends that the Government may not rely on Boeli's alert because the Government has not come forward with sufficient evidence of Boeli's reliability. Defendant asserts that all of the evidence in this case must be suppressed because it derives from an unconstitutional trunk search.

The Government contends that Boeli's alert behavior constituted probable cause. The Government asserts that Agent Miranda and Boeli are a certified Border Patrol detection team and successfully completed the certification requirements for the detection of concealed humans and the odors of certain controlled substances. The Government asserts that the training and certification records and the testimony of Agent Miranda establish the reliability of Boeli's alert behavior as a basis for probable cause to search the trunk.

"The automobile exception permits police to search a vehicle as long as the vehicle is 'readily mobile' and 'probable cause exists to believe it contains contraband.'" *United States v. Davis*, 530 F.3d 1069, 1084 (9th Cir. 2008) (quoting *Pennsylvania v. Labron*, 518 U.S. 938, 940 (1996) (per curiam)). "[P]robable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules." *Illinois v. Gates*, 462 U.S. 213, 231 (1983). "Probable cause exists when, under the totality of the circumstances, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Davis*, 530 F.3d at 1084 (internal quotations omitted). In *Florida v. Harris*, _ U.S._, 133 S. Ct. 1050, 1055 (2013), the Supreme Court explained,

[E]vidence of a dog's satisfactory performance in a certification or training program can itself provide sufficient reason to trust his alert. If a bona fide organization has certified a dog after testing his reliability in a controlled setting, a court can presume (subject to any conflicting evidence offered) that the dog's alert provides probable cause to search. The same is true, even in the absence of formal certification, if the dog has recently and

1 successfully completed a training program that evaluated his proficiency
 2 in locating drugs. After all, law enforcement units have their own strong
 3 incentive to use effective training and certification programs, because only
 accurate drug-detection dogs enable officers to locate contraband without
 incurring unnecessary risks or wasting limited time and resources.

4 A defendant, however, must have an opportunity to challenge such
 5 evidence of a dog's reliability, whether by cross-examining the testifying
 6 officer or by introducing his own fact or expert witnesses. The defendant,
 7 for example, may contest the adequacy of a certification or training
 8 program, perhaps asserting that its standards are too lax or its methods
 9 faulty. So too, the defendant may examine how the dog (or handler)
 10 performed in the assessments made in those settings. Indeed, evidence of
 the dog's (or handler's) history in the field, although susceptible to the kind
 of misinterpretation we have discussed, may sometimes be relevant, as the
 Solicitor General acknowledged at oral argument. And even assuming a
 dog is generally reliable, circumstances surrounding a particular alert may
 undermine the case for probable cause—if, say, the officer cued the dog
 (consciously or not), or if the team was working under unfamiliar
 conditions.

11 The question—similar to every inquiry into probable cause—is whether
 12 all the facts surrounding a dog's alert, viewed through the lens of common
 13 sense, would make a reasonably prudent person think that a search would
 reveal contraband or evidence of a crime.

14 *Id.* at 1057-58 (citations omitted). *See United States v. Thomas*, 726 F.3d 1086, 1096
 15 (9th Cir. 2013) (“*Harris* explained that a defendant must be afforded the opportunity
 16 to challenge ‘evidence of a dog’s reliability, whether by cross-examining the testifying
 17 officer or by introducing his own fact or expert witnesses.’”).

18 In this case, Defendant has challenged the reliability of the training program and
 19 the circumstances surrounding the alert behavior. Defendant challenged Boeli’s ability
 20 to distinguish cars with people inside from cars with people concealed inside during the
 21 cross examination of Agent Miranda. Agent Miranda was not able to provide any
 22 evidence to support Boeli’s training to detect concealed people in moving vehicles.
 23 Agent Miranda testified “I don’t really know how they do the training or how [Boeli]
 24 does it. It amazes me too, but it works.” (ECF No. 111 at 44). Agent Miranda stated,
 25 “I trained with my dog on these odors, but the actual training that goes into him
 26 knowing the difference is something that the . . . instructors do that and stuff. I don’t
 27 know how the dog would know the difference, but they just do. It is pretty amazing.”

28 *Id.* at 84-85.

1 Defendant presented evidence from an expert who testified that it is not possible
2 to train a dog to alert to concealed human smell but ignore or differentiate other human
3 smell in the same vehicle. Defendant's expert testified,

4 there is no way of separating the odors or making the odor different for the
5 person that is in the trunk, even in training. . . . As we're driving in a
6 vehicle, whether you are in the trunk or in the front, almost always the
7 odor is pushed to the rear of the vehicle, given air-conditioning, given the
8 movement. . . . Again, the dog is simply wanting his reward, his toy. As
soon as he smells human odor coming from a vehicle. Whether it is a
patrol dog looking for a suspect or a dog that is looking for something that
is hidden in the vehicle, if there are people in the driver seat, he is going
to indicate; if there is somebody in the trunk, he is going to indicate.

9 *Id.* at 152. The Government did not present evidence to establish that Boeli's was
10 trained to distinguish cars with concealed human smell but ignore or differentiate other
11 human smell in the same vehicle. While the Government presented Performance
12 Standard Score Sheets indicating that the team practiced finding concealed humans,
13 Defendant presented evidence that the training records were not reliable and the
14 certifications were not completed by an independent agency.

15 In this case, Agent Miranda based his determination of probable cause solely
16 upon Boeli's initial alert behind the trunk as shown on the video. Agent Miranda
17 testified that Boeli indicated interest in Defendant's vehicle when his body tensed and
18 his demeanor changed. Agent Miranda testified that he continued to search to see if he
19 could get Boeli to pinpoint the source of his interest. Agent Miranda testified that
20 Boeli did not sit at the trunk area and did not back up and bark at the trunk area.
21 Defendant's expert testified that the initial alert behavior shown on the video is no more
22 than interest behavior and does not indicate that dog has found the odor that he is
23 trained to find. The Government presented no further evidence to rebut or otherwise
24 explain this testimony.

25 "The question . . . is whether all the facts surrounding a dog's alert, viewed
26 through the lens of common sense, would make a reasonably prudent person think that
27 a search would reveal . . . evidence of a crime." *Florida*, 133 S.Ct. at 1058. In this
28 case, the Court concludes that the Defendant has presented a credible challenge to the

1 alert behavior and the reliability of the dog training by cross examining the testifying
2 officer and by introducing expert testimony. The Court concludes that the Government
3 has not proven that the evidence of Boeli's behavior at the trunk of Defendant's vehicle
4 meets the probable cause standard.

5 **IV. Conclusion**

6 The Court concludes that the search of Defendant's trunk without a warrant,
7 without consent, and without probable cause was unconstitutional. All evidence derived
8 from this search must be suppressed.

9 IT IS HEREBY ORDERED that (1) the motions to suppress evidence obtained
10 at an unconstitutional checkpoint (ECF Nos. 53-1 and 67-1) are denied; and (2) the
11 motions to suppress evidence obtained by an unconstitutional trunk search (ECF Nos.
12 53-2 and 67-2) are granted.

13 DATED: December 22, 2015

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15 **WILLIAM Q. HAYES**
16 United States District Judge
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